SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 236

INTERNATIONAL STEVEDORING COMPANY,
A CORPORATION, PETITIONER,

against

R. HAVERTY, RESPONDENT.

BRIEF OF RESPONDENT

Statement of the Case. Facts and Law, briefly stated.

The undisputed facts in this case are that the respondent Haverty, in the course of his employment by the petitioner, was injured when a load of wool weighing about 1800 pounds was negligently lowered into the hold of a vessel, striking him on the small of the back. At the time of the injury he was in the open hatchway, head bent down, engaged in "upending" a bale of wool previously lowered, preparatory to stowing it away in one of the wings of the ship.

The negligence of the petitioner consisted of the following acts:

1st, violating an agreement with the respondent which prohibited the lowering of a load whilst the men in the open hatchway were stowing away a previous load, and

2nd, failing to sound the customary warning of the descent of a load, which was agreed to be done under all circumstances.

It is conceded that the tort is maritime in nature, and liability should be judged by maritime standards. For the Court's consideration and ultimate application three principles of law are presented by the parties to this suit. They are as follows:

1st, the fellow servant doctrine, presented by the petitioner;

2nd, the non-delegable duty doctrine, an outgrowth and modification of the fellow servant doctrine, presented by the respondent; and

3rd, the Jones Act (Federal Employers Liability Act) which abrogated the fellow servant rule, also presented by the respondent.

Of the three principles presented to the Court only one is a maritime standard of employment conduct, the Jones Act; the other two are of common law or land origin. However, in their ultimate results, which will more clearly appear further on, the application of either principle contended for by the respondent—the non-delegable duty doctrine or the Jones Act—will be the same, i. e.

"A servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent."

St. Louis v. Jeffries, 276 Fed. 73 (1921), where cases under both principles of law presented by respondent have been collected by the Court (See page 75).

OUTLINE OF LEGAL PROPOSITIONS

"A"

The Supreme Court of the United States will uphold a State Court providing its decision in a maritime case will work no material prejudice to the uniformity of the maritime law.

Southern Pacific v. Jensen, 244 U. S. 205.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

"B"

Master and Servant relations on land.

Evolution of fellow servant doctrine.

(1) The law of fellow service is a common law doctrine.

Murray v. South Carolina R. Co., 1 McMullan's 385, 36 Am. Dec. 268 (1841).

Farwell v. Boston, etc., Co., 4 Metcalf 49, 38 Am. Dec. 339 (1842).

18 R. C. L. p. 715.

"Genius of the Common Law," Sir Frederick Pollock, p. 102.

(2) The fellow servant doctrine was modified by the common law courts because of its harsh effects in employment relations, giving rise to non-delegable duty and other doctrines.

18 R. C. L. pp. 716, 717, 730, 731.

Hough v. Texas, 100 U. S. 213.

(3) The duty of giving warnings and signals to servants where such acts are necessary to the safety of the men is a non-delegable duty.

Union Pac. v. Fort, 17 Wall, 553,
Wabash v. McDaniels, 17 Otto 454,
Mather v. Rillston, 156 U. S. 391,
Sante Fe v. Holmes, 201 U. S. 438,
Kreigh v. Westinghouse, 214 U. S. 255,
Standard Oil v. Brown, 218 U. S. 78,
18 R. C. L., 734,
Cook v. Camp, 183 N. C. 48,
26 Cyc. 1168,
Labatt, Master & Servant, 2nd Ed. p. 2936, p. 4308,
Anderson v. Mill Co., 42 Minn. 424,
Mooney v. Belleville Stone Co., 61 N. J. L. 253,
Burlington v. Crocket, 19 Neb. 138,
Ondix v. Tea Co., 82 N. J. L. 511,
Erickson v. St. Paul, 41 Minn. 500,
Maness v. Coal Corp. 128 Tenn. 143,
Bowman v. Coal Co., 168 Mo. App. 703,
Hough v. Grants Pass, 41 Ore. 531,
Chicago v. Gross, 35 Ill. App. 178,

Postal Tel. v. Hulsey, 132 Ala. 444,
Wendell v. Penn., 57 N. J. L. 467,
Lyons v. Ryerson, 148 Ill. App. 284,
Jones v. R. Co., 149 Ky. 566,
Hines v. Mfg. Co., 199 Mass. 522,
Fitzgerald v. Twine Co., 104 Minn. 138,
Lancaster v. R. Co., 143 Mo. App. 163,
Germanus v. R. Co., 74 N. J. L. 662,
Baccelli v. Delaware, 122 N. Y. S. 849,
Toledo R. Co. v. Bartley, 172 Fed. 82,
Chicago R. Co. v. Dutcher, 182 Fed. 494,
Allard v. Contract Co., 64 Wash. 14,
McLellan v. Fuller, 226 Mass. 374,
Moore v. R. Co., 185 N. C. 189,
Waiswilla v. R. Co., 220 Ill. App. 113,
Coast Ship Co. v. Yeager, 120 Miss. 152,
Brown v. Sessler, 128 Tenn. 665,
Arveson v. Boston, etc., Wharf, 128 Minn. 178,
United v. Kuchan, 253 Fed. 425,
Preston v. R. Co., 292 Mo. 442,
Richmond v. Bailey, 92 Va. 554,
Schoen v. R. Co., 112 Minn. 38,
McKee v. R. Co., 151 Ky. 698,
McCalley v. R. Co., 169 Ky. 47
Huxoll v. R. Co., 99 Neb. 170,
Curran v. R. Co., 211 N. Y. 60,
Illinois v. Zimekowski, 220 Ill. 324,
Peters v. George, 154 Fed. 634,

Western Electric v. Hanselman, 136 Fed. 564,
Maloney v. Stetson, 46 Wash. 645,
Cole v. Gerrick, 62 Wash. 226,
Comrade v. Atlas, 44 Wash. 470,
Cunningham v. Adna, 71 Wash. 111,
O'Brien v. Page, 39 Wash. 537.

(4) The States abrogated the fellow servant doctrine by the progressive enactment of Fellow Servant, Employer's Liability and finally Workmen Compensation Acts.

18 R. C. L. 821-824,

28 R. C. L. p. 712 et seq.

Labatt, Master & Servant, Vol. 8, p. 8864 et seq.

(5) Congress abrogated the fellow servant doctrine by enacting the Federal Employer's Liability Act.

18 R. C. L. 825,

2nd Employer's Liability Cases, 223 U. S. 1.

(6) Under both the common law and Federal Employer's Liability Act the duty of giving signals and warnings is a non-delegable duty, and if the master fails to give these he is negligent. The law is uniform in both State and Federal Courts.

See cases under heading, "3", supra.

St. Louis v. Jeffries, 276 Fed. 73; where cases have been collected on p. 75.

Collins v. Barner, 268 Fed. 699,

Federal Mining Co. v. Anderson, 247 Fed. 472,
Brown v. Pacific Coal, 241 U. S. 571,
Labatt, Master & Servant, p. 4308, 2nd Ed.,
McGovern v. Philadelphia, 235 U. S. 389,
Lehigh Valley v. Doktor, 290 Fed. 760,
B. & O. v. Robertson, 300 Fed. 314.
Hogan v. Killeen, 265 Fed. 614,
Director General of Railroads v. Templin, 268 Fed. 483,
Reed v. Director General, 258 U. S. 92,
Glacken v. Cincinnati, 209 Ky. 28.

"C"

Master and Servant Relations on water.

The Doctrine of fellow service in Admiralty.

(1) The "Maintenance, wage and cure" doctrine permits a seaman to recover for injuries without regard to the negligence of a coworker (a medieval doctrine).

Harden v. Gordon, 2 Mason 541; 11 Fed. Cases 480,
The Osceola, 189 U. S. 158,
Washington v. Dawson, 264 U. S. 232.

(2) The Admiralty Courts adopted the Merchants' Shipping Act of 1876 (English) permitting a seaman to recover damages for unseaworthiness of the vessel without regard to the negligence of a coworker.

The Osceola, supra,
Washington v. Dawson, supra.

(3) The Federal Courts, Supreme and inferior, adopted the progressive features of the common law doctrine of fellow service in longshoremen cases.

Atlantic Transport Co., v. Imbrovek, 234 U. S. 52,
Standard Oil v. Anderson, 212 U. S. 215,
The Buffalo, 154 Fed. 815,
The Buffalo, 147 Fed. 304,
Benedict on Admiralty, 5th Ed. p. 33,
Panama v. Minnix, 282 Fed. 47,
Magdaline, 91 Fed. 798,
The Howell, 273 Fed. 513,
Kinghorn, 297 Fed. 621,
Alaska Pac. v. Egan, 202 Fed. 867,
Flynn v. Christensen, 273 Fed. 385,
Pioneer, 78 Fed. 600,
Galley v. Smith, 272 Fed. 999,
City of Antonio, 143 Fed. 955,
Victoria, 69 Fed. 160,
Boveric, 167 Fed. 520,
Gladestry, 128 Fed. 591,
Lisnacrieve, 87 Fed. 570,
Pac. Am. Fisheries v. Hoof, 291 Fed. 306,
Siebert v. Patapsco, 253 Fed. 685,
Anderson v. Pittsburg Coal Co., 108 Minn. 455,
Westlund v. Rothchild, 53 Wash. 626,
Anderson v. Globe, 57 Wash. 502,
Jacobsen v. Rothchild, 62 Wash. 127,
Norman v. Shipowners, 59 Wash. 244.

(4) The Admiralty Courts adopted as part of the admiralty law State Statutes which worked no material prejudice to the uniformity of the maritime law.

The Hamilton, 207 U. S. 398,
Western Fuel v. Garcia, 257 U. S. 233,
Great Lakes v. Kierejewski, 261 U. S. 479,
Red Cross Line v. Atlantic Fruit, 264 U. S. 109,
Millers', etc. v. Brand, Advance opinion decided Feb. 1, 1926.

(5) Congress established a new public policy in maritime employment relations by introducing the vice principle doctrine in 1915, passing

Sec. 20, Act of March 4, 1915, 38 Stat. at L. Chap. 153, p. 1185.

(6) Congress abrogated the fellow servant doctrine in 1920 by enacting the Jones Act, and brought into admiralty a large body of land doctrines.

Sec. 33 of the Act of June 5, 1920, Chap. 250, 41 Stat. at L. 1007,

Panama v. Johnson, 264 U. S. 375.

(7) Under both the common law and Federal Employers Liability Act (Jones Act) the duty of warning and signaling is non-delegable.

St. Louis v. Jeffries, supra,

See cases under (B 3) (B 6) and (C 3).,

Atlantic v. Imbrovek, supra,

Panama v. Johnson, supra.

(8) The application of the monitory signal doctrine will work no material prejudice to the uniformity of the maritime law, and it will give effect to an employment agreement entered into by the parties—to furnish the servant a safe place to work.

Anderson v. Pittsburg Coal Co., supra,
St. Louis v. Jeffries, supra,
Millers' v. Brand, supra,
Atlantic Transport v. Imbrovek, supra.

STATEMENT OF FACTS—*The Injury*

"In order to clearly understand the (legal) questions thus raised," said Chief Justice Tolman, the writer of the opinion in the State Court, p. 237, 134 Wash. Rep., "the facts must be stated with some detail." More frequently in the discussion of principles of law the facts concerning the injury and the obligation of the master are lost sight of. As Judge Stacy has pertinently stated it in a similar case involving the monitory signal doctrine in a well reasoned opinion, "the mental confusion which has led to discordant adjudications on the subject . . . . is produced by momentarily losing sight of the plaintiff's safety and the duty which the defendant owed to him, while thinking of the relation existing between the plaintiff and the other employees." *Cook v. Camp Mfg. Co.*, 183 N. C. 48; (1921).

Continuing the facts Judge Tolman said, bottom of page 237:

> "The respondent and his fellow laborers were employed at the bottom of the ship, some forty or fifty feet below the deck upon which the winches stood and where the winch driver and the hatch tender had their stations. It was the duty of the hatch tender to see to the gear, have everything in order, and direct the operations.

"The loading operations in progress when the accident occurred were carried on in this wise: A sling, attached to a boom, was deposited upon the dock, in which was placed a load of four bales of wool, each bale weighing from four hundred to five hundred pounds, and the total load weighing from sixteen hundred to two thousand pounds. The hatch tender standing near the rail of the vessel, supervised the fastening of the sling, and when it was loaded and in order, it was his duty to give a signal to the winch driver to raise the sling and carry its load over and above the hatch, ready for lowering. It was then the duty of the hatch tender to step to the hatch, look over the coaming into the hold, observe if the previous load had been disposed of, and then give a warning to the men engaged below by calling out, "Look out below," or words to that effect; and thereupon, and not until then, to give the winch driver directions to lower the load into the hold. The men thus warned stood back from the open hatchway until the load came within their reach, when they swung or pushed it into position to be released and deposited. The sling was then carried up by the operation of the winch and the process repeated.

"With reference to the particular load which caused the injury, the evidence, so far as it goes, is undisputed; but that evidence fails to show whether the load was lowered by the order of the hatch tender or whether it was lowered by the winch driver without any such order. But lowered it was, without any warning to those engaged below, and at the time the respondent was in a stooping position, bending over the previous load in the discharge of his duties, and the descending load struck him upon the back, causing his injuries, the extent and nature of which need

not now be described."

If from the cold printing of these facts the Court can visualize the helpless condition of the respondent—lulled into a sense of security by the promises of the master to look out for his safety—and see the urgent necessity for carrying out the two safety agreements set forth in the fore part of the brief, this Court will agree with Judge Tolman when he said, p. 244, "we think if the facts of this case are carefully considered, and it is recognized that respondent was working in a place and under conditions where he could do nothing for his own protection and must rely absolutely upon the performance by the master of the duty to warn him of descending loads, the non-delegability of that duty becomes apparent, and the hatch tender under the circumstances shown became a vice principal."

"A"

The Supreme Court of the United States will uphold a State Court providing its decision in a maritime case will work no material prejudice to the uniformity of the maritime law.

The facts being undisputed the question now is, did the Supreme Court of the State of Washington apply a principle of law which contravenes an essential feature of the maritime law? *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149.

If the injury had occurred on land—if respondent had been a land longshoreman—there is no doubt that the respondent would have been entitled to recover under the Washington Workmen's Compensation Act. St. ex rel

Davis-Smith v. Clausen, 65 Wash. 156.

Moreover, if he had been a sailor doing the same kind of work, under exactly the same conditions (in a number of vessels the sailors still do the loading and unloading) the respondent would be entitled to recover under the Jones Act. *St. Louis v. Jeffries*, supra.

But because he was employed by a stevedoring company—instead of a shipowner—to perform work, the stowage of cargo, which is as necessary to the safety of the vessel as the steering (Imbrovek case, supra) petitioner contended in the State Courts, and does here also, that the respondent cannot recover because of the doctrine of fellow service, which it labels a maritime principle. That doctrine we contend is a common law or land principle. To the petitioner the character of the employer (and not the locality of the injury or the character of the employment) determines primarily the principle of law to apply. Evaluating petitioner's contention properly the respondent is placed in the anomalous position of having his maritime tort judged not by maritime standards but by the common law standard of 1841, as will hereinafter appear.

On the other hand respondent requested, and does here also, the application of one of two principles of law, either the non-delegable duty doctrine or the Jones Act. As stated before the application of either one is the same, "a servant is entitled to warnings and signals in an unsafe place where such signals have been customarily given."

The State Supreme Court rejected the fellow servant doctrine. Instead, it applied the non-delegable duty doctrine, although it thought the Jones Act the better of the two principles proposed by respondent. However, in applying the former the Court did not destroy the uniformity of the maritime law. Imbrovek case.

Moreover, by adopting the principle of law that the respondent was entitled to a warning the Court gave full force and effect to the agreement of employment conditions entered into by the parties to the suit.

Millers' Indemnity Underwriters v. Brand, Adv. Op. Decided Feb. 1, 1926.

"B"

Outline of Argument—*Fellow Servant Doctrine.*

Petitioner contending that the fellow servant doctrine is an essential feature of the maritime law our starting point will be with that doctrine. Moreover, by commencing with the fellow servant doctrine we will be able to pass successively into the principles contended for by the respondent.

A kaleidoscopic view, for the present, of the fortunes of the fellow servant doctrine on land and water will show that that doctrine was first announced as a rule of conduct in 1841 on land, in a railroad case; went through a process of modification by the courts and was finally rejected by the legislatures, state and national. Its application today as modified by the many exceptions, is confined to comparatively few cases. A more humane and certain

method of compensation for industrial injuries is being applied today in by far the great majority of the cases through State Compensation Acts. Public policy, judicial and legislative, has decreed against the fellow servant doctrine.

The basic causes for the birth, growth, modification and rejection of the fellow servant doctrine are traceable to the great changes in employment relations which have been brought about by the introduction and extended use of machinery in our economic life the past century and more. As machinery came more and more into general use, requiring more employees to perform the general operation of manufacturing, mining, and transportation, new problems in torts arose, and the courts sensing the great changes were compelled to modify the original meaning of the fellow servant doctrine. Finally many of the state legislatures, and Congress, tired of the manner in which courts determined liability, "by the sporting rules of the common law" abolished the doctrine in its entirety. 28 R. C. L. 750.

In the second section of this brief an attempt will be made to trace the fortunes of the fellow servant doctrine in admiralty. For the present it is sufficient to state that on water the same basic economic causes can be seen at work in the evolution of ships and shipping relations as on land. The use of machinery motivated by steam brought into the vessel new employees, such as coal passers, firemen, engineers and finally stevedores. Imbrovek case. The fellow servant doctrine crept into the admiralty courts (The Howell, 273 Fed. 573) ("The exten-

sion to the admiralty of the Fellow Servant Doctrine," Cunningham, 18 Har. Law Review, p. 295) when attempts were made on the part of injured maritime employees to override the medieval maritime rules of conduct, and obtain the benefits of the common law principles then prevailing. In the early admiralty cases no distinction was made by the courts as to the maritime nature of the principle to be applied. But when the line was drawn fast in the admiralty courts, in 1914, in the Imbrovek case, some of the more enlightened judges refused to follow the common law doctrine of fellow service of 1841. Instead they applied the ordinary theories of negligence, the Howell, supra, or the fellow servant doctrine as modified, The Kinghorn, 297 Fed. 621.

While the admiralty courts were legislating the many exceptions into the fellow servant doctrine, as on land, Congress took a hand, and in 1915 and 1920 rejected the doctrine, passing the Jones Act (in 1920) which established a new rule of conduct for maritime employees. That act placed employees on vessels upon the same plane with interstate commerce employees. *Panama v. Johnson,* 264 U. S. 375.

From the above it is obvious that time, with its accompanying changes in conditions, relations and public policies, has not been gentle with the fellow servant doctrine.

(B 1) The Law of Fellow Service is a Common Law Doctrine.

Prior to the introduction of machinery the cobbler, weaver, draper and other artisans attended to all the

details of producing an article. He was a handicraftsman. He produced the entire article himself, for example, he made a pair of shoes. But with the invention and use of machinery (fixed by historians, 1765) detailed production was introduced, each employee performing a single, a specialized detail of the general operation, be that manufacturing an article or operating a train. As Judge Evans said in 1841 in *Murray v. South Carolina R. Co.*, 1 McMullan's 385, 36 Am. Dec. 268:

> "The regular movement of the train of cars to its destination is the result of the ordinary performance by each of several duties. If the fireman neglects his part the engine stops for want of steam; if the engineer his, everything runs to riot and disaster."

Hence, when new employment conditions and relations —railroad operations—presented themselves to the courts in the Murray case and *Farwell v. Boston, etc.*, 4 Metcalf 49, 38 Am. Dec. 339 (1842), they found the old rule of "respondeat superior"—based on handicraft production —unadaptable to the new situations. These courts therein announced that employees working for a common master, and performing details of a general operation were fellow servants, and for any negligence of a fellow servant committed in the performance of a detail the employer was not liable. 18 R. C. L. 715. In passing, it is worth noting and repeating that although the use of machinery divided the labor into details, and required the services of several to perform those details to complete the general operation the term "common employment" was tagged onto the fellow servant doctrine rather than the later concept of "operative details."

Of some significance here now is the social reason advanced by Chief Justice Shaw (Farwell Case) for projecting the new principle, which was progressive for its time. "In considering the rights and obligations arising out of particular relations it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from such rules, as will, in their practical application best promote the safety and security for all parties concerned."

For a delightful account of the origin of the fellow servant doctrine see p. 102 "Genius of the Common Law" by Sir Frederick Pollock (1912).

(B 2) The fellow servant doctrine was modified by the common law courts because of its harsh effects in employment relations giving rise to non-delegable duty and other doctrines.

But, "Hardly had the doctrine of fellow service come into general recognition than it became apparent that rapidly changing economic conditions rendered it impolitic at least in unmodified form." 18 R. C. L. p. 716. Its harsh effects were quickly noticeable in those cases where the injured servant was employed by corporations, which, continues R. C. L. pp. 716, 717, "if they were to be exonerated from liability for injuries to their employees on the score of fellow service it followed that they could be liable in no case, inasmuch as they must need act and perform their functions through individuals who have a common employer. Changed ideals dictated a modification of the doctrine." (Note: According to the Bureau of the Census corporations employed in 1919 86 per cent

of the working population. World Almanac, 1924, p. 339.) In view of the increased number of corporations the reason for the change is stronger today. "The first of the qualifications of the doctrine to be generally recognized was the rule relating to the competency of co-employees. This seems to have satisfied requirements for a considerable time, but still further changes in economic conditions and public policy have dictated the principles of non-delegable duties, superior and inferior employees, and, more recently, different departments."

The rapidly changing economic conditions which prompted the courts to graft onto the fellow servant doctrine the various exceptions are traceable to the increased use of machinery. As the use of machinery was extended more servants were employed, and of significance here the number of details necessary to perform the general operation, namely, making shoes, were greatly increased.

> "When the law of fellow servant was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of simple and common undertakings. Now things have changed, large enterprises are conducted by persons or by corporations employing vast number of servants divided into classes, each pursuing a different portion of the work and each practically independent of the other." 18 R. C. L. 758.

J. A. Hobson in his most excellent work, "Evolution of Modern Capitalism" (cited with approval in *Maple Flooring Mfrs' Ass'n v. U. S.*, 268 U. S. 563) has characterized the great change in the following language, p. 88:

> "The typical unit of production is no longer a single family, or a small group of persons with a few simple cheap tools, but a compact and closely organized mass of labor composed of hundreds of individuals cooperating with large quantities of expensive and intricate machinery, through which passes a continuous and mighty volume of raw material on its journey to the hands of the consuming public."

It was precisely because of the increasing number of detailed operations necessary to complete the general process of production and service that brought into legal existence the various modifying rules of the fellow servant doctrine of 1841. To take care of the multifarious details, superintendents, managers and others were employed, giving rise to the superior and inferior servant or vice principle doctrine. Many details of the general operation necessitated a further division of labor supervision into departments, and the departmental doctrine was announced. To safeguard the person and the life of the servants engaged in performing the various details employers were compelled by the courts to install safety guards, promulgate rules for operation, inspection of moving appliances and tools, and to give instruction and provide for warnings of moving operations and moving appliances. All of which gave rise to non-delegable duty and other rules modifying the original doctrine of fellow service.

> "Another exception to the fellow servant doctrine as it was originally announced embraces what have been termed 'absolute' or 'non-delegable' duties of the employer. This exception, which seems to have been invented to meet the economic change caused by

the substitution of corporations for natural persons in commercial enterprises, declares that there are certain duties which the employer is absolutely bound to perform. While the corporation may confide their performance to an inferior officer or agent, it may not escape liability thereby. If the person to whom performance is confided neglect the obligation, his negligence is still that of the corporation. It is no answer to say that the corporation selected a competent person and that such person is in other respects a fellow servant of the injured employee. In respect of these duties he cannot be a fellow servant; he is a vice principal or agent of the employer." 18 R. C. L. pp. 730 and 731.

This steady march of legal progress by the courts in modifying the fellow servant doctrine was not universally followed. A few of the courts attempted to stem the tide. In 1893, Judge Hackney predicted the destruction of our industrial system, if the fellow servant doctrine be tampered with, saying:

> "The fellow servant doctrine is founded in wisdom and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants."
>
> *New Pittsburg, etc., Co. v. Peterson*, 136 Ind. 398.

It is pertinent at this point to say that notwithstanding the doctrine has been abrogated by the States and Congress through the enactment of Workmen's Compensation Acts and Federal Employers Liability Acts for land and sea employees the country since the '90's has witnessed a tremendous growth in industry. See "Readings In Indus-

trial Society'' by Leon Carrol Marshall, p. 655; and ''Economic History of the United States'' by E. L. Bogart, pp. 408, 425, 453.

Some of the courts were more astute than Judge Hackney. Resurrecting the old reason for the legal invention of the fellow servant doctrine, to-wit, ''operative details,'' and tagging that term on they managed to keep alive the doctrine with some semblance of its old-time vigor by denying compensation to many injured employees. Those cases can be found on pages 26 to 34 in petitioner's brief. They are traceable to the Murray and Farwell, supra, cases of the '40's. The new idea, that warnings and signals were necessary to the safety of the men, coming into existence as a result of changed economic conditions and agreements since 1841, was not able to dislodge with cataclysmic effect the old idea and symbol which had its roots in the two early cases.

The suggestion that an employer is not liable to a servant for negligence of a coservant carrying out the details of the work, fortunately for the progress of the law, was not followed by the majority of the courts. Some of them saw that if that principle be carried out logically to the end no servant can ever recover because in machine production the general operation of manufacturing shoes, for example, consists of detailed operations or ''operative details.'' No shoemaker today manufactures shoes by himself. Labatt, a writer of some prominence in the field of law, said that the only reason—if it can be called

such—the concept "operative details" has to support it is "by authority."

> "Viewed from the standpoint of the extent of a master's obligations to his servants the doctrine that there can be no recovery for the negligence of a coservant in respect to the details of the work has been regarded as one deduced ex necessitae rei. It seems difficult, however, to concede that such a consideration has any real weight, except in so far as it may be a step towards the conclusion that the servant assumes the consequent risks. Taken by itself it may be said to be equally potent as a reason for insisting that the master should be chargeable with the negligence which, under the arrangements which he has chosen to make for carrying on his business, he knows to be occasionally inevitable. Qui sentit commodum idem sentire debet et onus. In whatever cloak of verbiage it may be wrapt up, a doctrine having no more solid foundation than the hypothesis that one of these inferences rather than the other should be drawn from the existence of the conditions adverted to is merely one formulated *ex cathedra*.
>
> "A much more satisfactory reason for absolving the master from liability for negligence of this description is, that the servant is chargeable with an assumption of such risks because he knows them to be incident to the performance of the duties voluntarily undertaken by him. This is equivalent to saying that in cases in which the servant's right to recover is denied on account of the nature of the injurious act, this conclusion is, in the last analysis, referable to precisely the same elementary conception as that which underlies the doctrine of common

employment itself." *Labatt, Master & Servant,* Vol. 4, 2nd Edition, pp. 4554, 4555.

(B 3) Non-delegable Duty Doctrine—*Signals and Warnings.*

The more enlightened common law courts early adopted the salutary rule that "a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent.

26 Cyc. p. 1168:

"When there is a special agreement by the master to warn the servant, the nonperformance of which is the occasion of injury to the latter, the master will be held liable."

26 Cyc. p. 1168.

"Where the employer has adopted a system (as in this case) for the purpose of notifying servants of the approach of a certain kind of transitory or sporadic danger, it is plain that the fact of the servant's having relied on the receipt of the customary warning, and *being induced not to keep as careful a watch* (as in this case) *as he would have otherwise kept* constitutes a specific and additional reason for holding the master liable for injuries which may result from the omission to give the warning on some particular occasion."

Labatt's Master & Servant, 2nd Ed. p. 2936; also p. 4308.

The following list, by no means exhaustive, are all signal or warning cases. In a later part of this brief we

shall give a list of longshoremen cases.

18 R. C. L., 734,

Union Pacific v. Fort, 17 Wall 553,
Mather v. Rillston, 156 U. S. 391,
Sante Fe v. Holmes, 201 U. S. 438,
Kreigh v. Westinghouse, 214 U. S. 255,
Standard Oil v. Brown, 218 U. S. 78,
Cook v. Camp, 183 N. C. 48,
Anderson v. Mill Co., 42 Minn. 424,
Mooney v. Belleville Stone Co., 61 N. J. L. 253,
Burlington v. Crocket, 19 Neb. 138,
Ondix v. Tea Co., 82 N. J. L. 511,
Erickson v. St. Paul, 41 Minn. 500,
Maness v. Coal Corp., 128 Tenn. 143,
Bowman v. Coal Co., 168 Mo. App. 703,
Hough v. Grants Pass, 41 Ore. 531,
Chicago v. Gross, 35 Ill. App. 179,
Postal Tel. v. Hulsey, 132 Ala. 444,
Wendell v. Penn., 57 N. J. L. 467,
Lyons v. Ryerson, 148 Ill. App. 284,
Jones v. R. Co., 149 Ky. 566,
Hines v. Mfg. Co., 199 Mass. 522,
Fitzgerald v. Twine Co., 104 Minn. 138,
Lancaster v. R. Co., 143 Mo. App. 163,
Germanus v. R. Co., 74 N. J. L. 662,
Baccelli v. Delaware, 122 N. Y. S. 849,
Toledo R. Co. v. Bartley, 172 Fed. 82,
Chicago R. Co. v. Dutcher, 182 Fed. 494,

Allard v. Contract Co., 64 Wash. 14,
McLellan v. Fuller, 226 Mass. 374,
Moore v. R. Co., 185 N. C. 189,
Waiswilla v. R. Co., 220 Ill. App. 113,
Coast Ship Co. v. Yeaker, 120 Miss. 152,
Cement v. Brown, 45 Okla. 476,
Brown v. Sessler, 128 Tenn. 665,
Arveson v. Boston etc. Wharf, 128 Minn. 178,
United v. Kuchan, 253 Fed. 425,
Preston v. R. Co., 292 Mo. 442,
Richmond v. Bailey, 92 Va. 554,
Schoen v. R. Co., 112 Minn. 38,
McKee v. R. Co., 151 Ky. 698,
McCalley v. R. Co., 169 Ky. 47,
Huxoll v. R. Co., 99 Neb. 170,
Curran v. R. Co., 211 N. Y. 60,
Illinois v. Ziemkowski, 220 Ill. 324,
Peters v. George, 154 Fed. 634,
Western Electric v. Hanselman, 136 Fed. 564,
Maloney v. Stetson, 46 Wash. 645,
Cole v. Gerrick, 62 Wash. 226,
Comrade v. Atlas, 44 Wash. 470,
Cunningham v. Adna, 71 Wash. 111,
O'Brien v. Page, 39 Wash. 537.

From what has been said, and from what will follow, the modern trend should be in favor of the courts holding that the giving of signals, where they must be used to assure the men a safe place to work, and without which the work could not be done expeditiously, is a primary duty of the master which he cannot delegate.

"The trend of modern decisions, however, is in favor of holding the employer liable for a neglect of monitory signals as well as general instructions."

18 R. C. L. p. 734,

Cook v. Camp, supra.

The Supreme Court of the United States applied the warning and signal doctrine.

This Court long ago paved the way for the more enlightened state courts to follow. In 1880 Justice Harlan said in *Hough v. Texas R. R. Co.*, 100 U. S. 213, "There are well defined exceptions (to the fellow servant doctrine) resting upon principles of justice, expediency and public policy." Earlier in 1874, *Union Pacific v. Fort*, 17 Wall. 553, 21 Law Ed. 739, this Court held that a coworker who failed to warn an inexperienced employee of the dangers of moving machinery was not a fellow servant of the injured employee, but that the duty of warning such an employee was non-delegable. In 1883, *Wabash v. McDaniels*, 17 Otto 454, 27 Law Ed. 605, one McHenry "fell asleep at the switch" and because of which a collision occurred injuring the respondent. This Court there held that it was the duty of the employer to safeguard the lives of his employees, and the failure to do so was negligence of the employer, and not that of a fellow servant. In 1885, *Mather v. Rillston*, 156 U. S. 391, this Court held that an employee was entitled to warnings of danger in certain occupations. In 1906, *Sante Fe v. Holmes*, 201 U. S. 438, (overruling *Northern Pacific v. Dixon* cited by petitioner) Justice McKenna in a vigorous opinion held that a train dispatcher (whose duties were

similar to those of the hatch tender here) represented the master; that the duty of giving warnings or information of moving trains was the duty of the employer, and better still, a continuous duty, and for any failure to perform such a duty was the negligence of the master, and not that of a fellow servant. In 1909, *Kreigh v. Westinghouse*, 214 U. S. 255, where the plaintiff was injured by a swinging bucket the court reversed the lower court which had granted a non suit, stating that whether or not the plaintiff had reason to expect a warning was a question for the jury. In the case of *Standard Oil v. Brown*, 218 U. S. 78, Justice McKenna held that the failure of a coworker to give the customary warning or signal of the lowering of a bale of hay through a ceiling was not the negligent act of a fellow servant, but a duty imposed upon the employer.

Summarizing the cases herein cited we can say that this Court has held with the common law courts that the duty of giving warnings and signals of dangerous and moving operations where those warnings are expected and customarily given is a primary duty of the master, which cannot be delegated. Without such warnings the place would be unsafe, and the life of the employee would be always endangered.

The cases cited by petitioner are, with one or two exceptions—and which will be discussed later—distinguishable from the present one because here the employer agreed to warn the respondent of the lowering of loads, and further agreed not to lower a load whilst he was in the open hatchway engaged in stowing away a preceding

load. To hold otherwise would be to sanction violations of working agreements, promises made to lull a servant into a sense of security; a gross and inequitable doctrine contrary to public policy of the twentieth century. But a more important reason is that petitioner's cases do not now state the law as will presently appear.

> (B 4) The States abrogated the fellow servant doctrine by the progressive enactment of Fellow Servant, Employers Liability and finally Workmen's Compensation Acts.

As a result of some of the courts failing to keep step with the tremendous changes taking place in industry since 1841, the legislatures enacted laws favorable to employees. Commencing in 1880 when England passed Lord Campbell's Act, 43 and 44 Vict. Chapter 42, the legislatures in this country at one time or another passed either Fellow Servant or Employers Liability Acts. 18 R. C. L. 821-824. And finally many passed Workmen's Compensation Acts, 28 R. C. L. 712; *Labatt's Master & Servant*, Vol. 8, 2nd Ed. p. 8864 et seq., which threw the fellow servant doctrine together with all of its modifications onto the legal scrap heap. In enacting the latter a new concept for compensation to injured employees was introduced, a new public policy of treating industrial employees was formulated, the result of social experience and wisdom. Its introduction was bitterly contested. Answering the argument that the fellow servant doctrine was inviolate, Judge Burch said:

> "They (speaking of common law principles of fellow servant and assumption of risk) are court-made rules invented to meet certain ideals of justice

respecting certain social and economic conditions and relations. Should the conditions and relations be completely changed and those ideals wholly fail of realization, the reason for the rules, which is the life of all rules of the common law, would then be wanting, and the court which would go on enforcing them would be a conscious minister of injustice and not of justice." *Burgin v. M. K. & T. Ry. Co.*, 90 Kan. 194 (1913).

(B 5) Congress abrogated the fellow servant doctrine by enacting the Federal Employers Liability Act.

To make a uniform public policy throughout the country Congress in 1908 passed the Federal Employers Liability Act.

18 R. C. L. 825.

Immediately following its passage the act was bitterly attacked. Justice Vandevanter, in answer to the argument that the fellow servant doctrine was "sacred," stated that there was nothing sacred about any common law principle. "A person has no property, or vested interest, in any rule of the common law."

2nd Employers Liability Cases, 223 U. S. 1.

With the passing of the Federal Employers Liability Act in 1908 all cases in opposition to the principle announced by Congress should logically be shelved as not stating the law in 1926. The following railroad cases cited by petitioner must be regarded as being not in conformity with present public policy, if not obsolete:

Randall v. Baltimore, 109 U. S. 478.

Northern Pacific v. Charless, 162 U. S. 359,
Martin v. Atchison, 166 U. S. 399,
Northern Pacific v. Dixon, 194 U. S. 339,
Texas, etc., v. Baurman, 212 U. S. 536.

(B 6) Under both the common law and Federal Employers Liability Act the duty of giving signals and warnings is a non-delegable duty.

On the other hand all those cases cited by us in (B 3) being in agreement with the new concept as laid down by Congress and based upon legal and social experience gained from the study of new employment relations, should be decisive in this case. The law, in any event, whether we apply the common law or the Federal Employers Liability Act, is well settled, that " a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these he is negligent." See *St. Louis, etc. v. Jeffries*, 276 Fed. 73, 75, where the cases under both principles of law have been collected.

Other cases are:

Federal Mining Co. v. Anderson, 247 Fed. 472,
Collins v. Barner, 268 Fed. 699,
Brown v. Pacific Coal Co., 241 U. S. 571,
Labatt's Master & Servant, 2nd Ed. p. 4308, and p. 2936,
McGovern v. Philadelphia, 235 U. S. 389,
Lehigh Valley v. Doktor, 290 Fed. 760,
B. & O. v. Robertson, 300 Fed. 314,
Hogan v. Killeen, 265 Fed. 614,

Director General of Railroads v. Templin, 268 Fed. 483,

Glacken v. Cincinnati, 209 Ky. 28,

Reed v. Director General of Railroads, 258 U. S. 92,

See cases cited in B 3.

"C"

Master and Servant Relations on Water

The doctrine of fellow service in Admiralty.

Before entering into a discussion of the applicability of the doctrines presented by the parties to maritime torts, it will be both interesting and relevant to trace the changes in the ship's personnel, from galleyman to the amphibious longshoremen. The maritime law, we shall also observe, attempted to keep pace with these changes by paralleling them with the establishment of new employment theories. Fitted in with a setting of changing ships and shipping relations the necessity for new legal policies—judicial and legislative—will be readily apparent.

> "The law of the sea is not the product of any one brain, or any one age. It is the growth of experience, expanding with the expansion of commerce, and fitting itself to commercial necessities. It is properly a part of the law merchant on account of their intimate connection; and grew, not from enactment, but from custom; not from the edict of kings, but from the progressive needs of society."

Hughes on Admiralty, 2nd Ed. pp. 4, 5.

Benedict on Admiralty, 5th Ed. p. 724 et seq.

Benedict on Admiralty, 4th Ed. p. 4.

Just as the development of the common law is wrapped up in the evolution of agriculture, commerce, finance, and industry, so is the maritime law enveloped in the growth of ships and shipping. Without ships and shipping Admiralty Law is unthinkable. The building of the two, three, four and five-story rowing vessels of the ancients, the Mediterranean Galleon of the Middle Ages, and the "Square Rigger" of the 18th century, and finally the steel steamship of today with its thousands of horsepower engines, all tell one grand story of man's glorious efforts to supply the world's needs across the water. With the changes in ships also came changes in the personnel of the ships' crew. The galleymen of the five-story rowing vessel were displaced by the sailors of the Galleon and the Square Rigger. Today, on the steel steamship, the ship's personnel consists of sailors, firemen, oilers, machinists, electricians, boilermakers, carpenters, waiters, barbers, freight clerks and a host of others. The ship of today is, in many instances, a floating city. In port, stevedores, riggers, riveters, caulkers, watchmen, and many others are employed on board ship. From this kaleidoscopic review we can see that with the evolution of the ship has come an increasing number of specialized details necessary to the general operation of the ship. All are intimately connected up with the general process of navigation, the carriage of passengers and freight. The work of longshoring is just as important to the safety to the vessel as is the steering.

"Upon its performance (the loading and stowing of cargo) depend in a large measure the safe carrying of the cargo and the safety of the ship itself; *and it is a service absolutely necessary to enable the ship to discharge its maritime duty.* Formerly the work was done by the ship's crew, but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "*as clearly identified with maritime affairs as are the mariners.*" (citing cases.)

Justice Hughes in Imbrovek case.

"The law is the outgrowth of man's needs in society" (Lee, Historical Jurisprudence, p. 1), and "with changes in the prevailing economic conditions (they) necessarily involve corresponding alterations in the law" (Loria, Economic Foundations of the Law, p. 240, Vol. 3, "Evolution of Law Series"). New business conditions, relations and agreements whether on land or sea require the application of new legal principles. New standards of legal conduct in shipping relations followed in the wake of the ship's growth. "Economics and law considered as static phenomena are related as content and form; but both are subject to change, the one continuously, the other (law) from time to time." (Berolzheimer, p. 22, "World's Legal Philosophies," Modern Legal Philosophy Series.)

Sensing the great changes in the shipping world the past century the great majority of the judges, sitting in maritime cases, involving the relations of master and servant, did not wait for Congress to act, but reached out their hands and brought into the maritime law legal principles adopted from the medieval age, from England,

from the Common Law, from the States, and from Congress in an endeavor to approximate the law to the rapidly changing shipping conditions. They did as Pickard, the great Belgian writer said, "We must sense the evolution of law. Otherwise our knowledge lacks clearness and permanence. Our work is done at random, amidst the darkness of our guesses, on an ocean of chimeras." Pickard, p. 678, Vol. 3, "Evolution of Law Series."

(C 1) The "maintenance, wage and cure doctrine" gives to seamen the right of recovery for injury received in the course of his employment regardless of the negligence of the act of a co-seaman.

For centuries the maritime law has been that a shipowner is liable to a servant injured in the courts of his employment for his maintenance, wage and cure for the length of the voyage, regardless of the person or thing causing the injury.

Harden v. Gordon, 2 Mason, 541; 11 Fed. Cases, 480,

The Osceola, 189 U. S. 158.

That doctrine negatives placing the responsibility upon a fellow servant for an injury.

Washington v. Dawson Co., 264 U. S. p. 232, Opinion of Justice Brandeis.

(C 2) Admiralty borrowed the "seaworthy" doctrine from England.

When the changes were made in the middle of the 19th century in the structure of ships from wood to iron, and

in propulsion from sail to steam, the English Parliament in 1876 provided that the shipowner shall be liable, even in the absence of negligence; for an injury received by a seaman from the unseaworthiness of the vessel. American admiralty courts adopted that doctrine.

Merchants Shipping Act of 1876, 29 and 40 Victoria, Chapter 80, Sec. 5,

The Osceola, supra,

Washington v. Dawson, supra.

The word seamen as a result of the changes in the ship's structure, and mode of transportation was broadened to include firemen, coal passers, oilers, and others in the engineering department, as well as those engaged in the steward's department, waiters, etc. They all signed ship's articles and went on voyages.

(C 3) The United States Supreme Court, the inferior Federal Courts and the State Courts adopted in admiralty cases the progressive features—the safe place to work rules—of the common law doctrine of fellow service.

"Owing to the exigencies of increasing commerce and the demand for rapidity and special skill" (Justice Hughes in the Imbrovek case) "the longshoreman was brought into existence" an amphibious creature, who works on land or water, as the duty of loading and unloading requires, and who signs no ship's articles, and goes on no voyages.

The two maritime principles just stated are inappli-

cable to his case, when injured, for he has no contractual relations with the ship or the ship owner; in most cases he is hired by a stevedore or stevedoring company as in this case.

In the seventies and the eighties when this new species was injured the admiralty courts, recognizing that the medieval and English principles just cited could not be stretched to fit his case, stepped over into the common law —reasoning by analagy, and borrowed the common law doctrine of fellow service as it then prevailed. Then, as previously stated, the fellow servant doctrine—either the "common employment" concept or the "operative detail" concept—made every employee with few exceptions a fellow servant. *The Harold*, 21 Fed. 428 (1884), the earliest of the federal cases cited by petitioner, aside from the fact that it is in opposition to *Standard Oil v. Anderson*, 212 U. S. 215, is based upon the common law conception of fellow service of 1841. So is the case of *Quinn v. N. J. Lighterage*, 23 Fed. 363, (1885) and the *Queen*, 40 Fed. 694.

But with the passage of a generation the Federal and State courts hearing longshoremen cases adopted the modifications of the fellow servant doctrine of 1841, including the Ninth Circuit. The only exception was in the case of winch drivers. By the repetition of the use of the Harold, Quinn and Queen cases it became a simple matter for that circuit to decide the pending case—where the injury was caused by the negligence of the winch driver (although here it is the hatch tender)—by referring to the earlier cases as decisive. According to the

new school of "Behaviorism" or "Freudianism" that circuit has developed a "winch driver complex." Neither the Hoquiam and later cases advance any reasons for their holdings. The judicial method employed in these instances has been aptly described by Dean Roscoe Pound as a "judicial slot machine," p. 170, "Spirit of the Common Law," as follows: "The theory . . . has made of the court a sort of judicial slot machine. The necessary machinery had been provided by legislation or by received legal principles and one had but to put in the facts above and take out the decision below. True, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed not at all to the thumping and joggling process, but solely to the machine."

Except in the winch driver cases, the Ninth Circuit, together with the State Courts, the other Federal Courts, and this court, sensed the need for modifying the doctrine of fellow service. They applied the safe place to work rule and the other progressive features of the common law. The following are a few of the longshoremen cases decided by the State Courts where the non-delegable duty doctrine was applied:

Anderson v. Globe, 57 Wash. 502,
Westlund v. Rothchild, 53 Wash. 626,
Jacobsen v. Rothchild, 62 Wash. 127,
Norman v. Shipowners, 59 Wash. 244,
Keating v. Pacific, 21 Wash. 415,

Nelson v. Willey, 26 Wash. 548,
Carlson v. White Star, 39 Wash. 394,
Anderson v. Pittsburgh, 108 Minn. 455 (1910).

In the Anderson case, last cited, Judge Jaggard in an excellent decision (1910) traces the evolution of opinion of both State and Federal courts in winch driver and hatch tender cases. Therein he criticises the earlier cases cited by petitioner, for example, *Herman v. Port Blakely Mill* (1896), *Ocean S. S. v. Cheeny* (1890), and *Portance v. Coal Co.* (1898). His conclusion is that where the place is unsafe, and the employer has agreed to give a warning of danger, the person charged with such duty is a vice principal. The Anderson case has been consistently followed to date. See *Cook v. Camp*, 183 N. C. 48 (1921); *Glacken v. Cincinnati*, 209 Ky. 28 (1925).

The vice principle doctrine has been applied by the Federal Courts (including the Ninth Circuit) in longshoremen cases:

The Buffalo, 154 Fed. 815,
The Buffalo, 147 Fed. 304,
Benedict on Admiralty, 5th Ed. 33,
Panama v. Minnix, 282 Fed. 47,
Magdaline, 91 Fed. 798,
The Howell, 273 Fed. 513,
Kinghorn, 297 Fed. 621,
Alaska Pacific v. Egan, 202 Fed. 867,
Flynn v. Christensen, 273 Fed. 385,
Pioneer, 78 Fed. 600,
Galley v. Smith, 272 Fed. 999,
City of Antonio, 143 Fed. 955,

Victoria, 69 Fed. 160,
Boveric, 167 Fed. 520,
Gladestry, 128 Fed. 591,
Lisnacrieve, 87 Fed. 570,
Pac. Am. Fisheries v. Hoof, 291 Fed. 306,
Siebert v. Patapsco, 253 Fed. 685.

This Court has in several cases refused to apply the fellow servant doctrine in "water" longshoremen cases. In *Standard Oil v. Anderson* (1909), 212 U. S. 215, a winch driver case, the employer argued strenuously for the application of that doctrine contending that the winch driver, gangman, and the injured longshoreman were all performing details of a general operation. This Court held that the giving of signals was not a giving of orders but of information, the same as it held in *Santa Fe v. Holmes*, supra.

In *Atlantic Transport Co. v. Imbrovek*, supra, the petitioner also contended for the application of the fellow servant doctrine, and again this Court applied the non-delegable duty doctrine, i. e., the servant was entitled to a safe place to work.

In the case of *Western Fuel v. Garcia*, 257 U. S. 233, where the Ninth Circuit held that the decedent and the winch driver were fellow servants, 260 Fed. 839 (by reference to the very early cases), this court, instead of affirming the case on that doctrine which would have disposed of it immediately, went into the questions of the applicability of the State Statutes of California to the issue. By doing so the inference is that the fellow servant doc-

trine was not an essential feature of the maritime law.

From the above it is obvious that in longshoremen cases the State and Federal Courts, and this Court, have adopted as part of the maritime law the modifications of the fellow servant doctrine of 1841, the safe place to work rule, i. e., whoever is charged with making the place safe to work whether by putting in pins or by warning, such a person is a vice principle.

(C 4) Admiralty adopted as part of the maritime law local features, State Statutes, where they did not contravene an essential feature of the maritime law.

Although neither admiralty nor the common law permitted the representative of a deceased employee injured in the course of his employment on a vessel to recover full indemnity admiralty applying equitable principles adopted State Statutes which granted such rights. "Admiralty applies equitable principles," *Kalfarli*, 277 Fed. 391; *Benedict on Admiralty*, 5th Ed. pp. 95, 97.

The Hamilton, 207 U. S. 398,
Western Fuel v. Garcia, supra,
Great Lakes v. Kierejewski, 261 U. S. 479.

Admiralty will enforce a maritime agreement to arbitrate differences.

Red Cross Line v. Atlantic Fruit, 264 U. S. 109.

Admiralty will enforce a compensation statute where the parties have agreed to accept compensation in lieu of a suit at law.

Millers', etc. v. Brand, decided Feb. 1, 1926, Adv. Op.

(C 5) Congress established a new public policy in employment relations on water by introducing the law the vice principle doctrine.

To keep pace with the great changes in shipping conditions and in line with the legal policies as formulated by the common law courts, Congress, in 1915, delimited the fellow servant doctrine in its application to seamen, passing Sec. 20, Act of March 4, 1915, 38 Stat. at L. Chap. 153, p. 1185:

> "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

This statute attempted to introduce into the maritime law the vice principle doctrine.

(C 6) Congress abrogated the fellow servant doctrine by enacting the Jones Act.

To bring the rights of maritime employees on a par with interstate commerce servants Congress in 1920 swept into "Davy Jones' Locker" the doctrine of fellow service.

Sec. 33 of the Act of June 5, 1920, Chap. 250, 41 Stat. at L. 1007.

> "Sec. 33. That section 20 of the Act of March 4, 1915, be, and is, amended to read as follows:
>
> "'Sec. 20. That any seaman who shall suffer personal injury in the course of ihs employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of

personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located'."

This statute brought into admiralty a large body of land principles, which prior to its enactment were denied to seamen. On land and on water public safety has decreed against the fellow servant doctrine.

Panama v. Johnson, 264 U. S. 375.

The Act of 1920 and the Panama case have by implication overruled the seamen cases cited by petitioner in its brief on pages 10 and 11. The purpose of the Jones Act was to avoid the mischief rendered by the application of the *Osceola, Quebec v. Merchant, Carlisle v. Sandanger* and other seamen cases which stated what the law formerly was. To use them now is to do violence to an act of Congress, and go contrary to the dictates of public policy.

Panama v. Johnson, supra.
Green Star v. Nanyang, 3 Fed. (N. S.) 369,
South & Central American v. Panama, 237 N. Y. 287.

(C 7) Under both the common law and Jones Act (Federal Employers Liability Act) the duty of warning is a non-delegable duty.

With the passage of the Jones Act and the rendition of the Panama case the law of master and servant on sea has been brought into uniformity with the laws of master and servant in railway cases. The law as administered by the common law courts requires that the master give warnings and signals to his employees where such warnings are necessary to make the working place safe. The same law is required in railroad cases.

St. Louis v. Jeffries, supra,
Cook v. Camp, supra,
Anderson v. Pittsburg, supra.

(C 8) The application of the monitory signal doctrine will not destroy the uniformity of the maritime law.

From what has been said the fellow servant doctrine was never an essential feature of the maritime law. Moreover it has been discredited on land or water by the courts and by the legislatures as follows:

On Land

The common law or land courts modified it by introducing many exceptions;

The legislatures abrogated it by enacting Workmen's Compensation Acts;

Congress abrogated it by enacting the Federal Employers' Liability Act.

On Water

Admiralty courts have modified it by applying the many exceptions;

Congress modified it by enacting the vice principle doctrine in 1915;

Congress abrogated it by enacting the Jones Act in 1920.

Public policy, both judicial and legislative, have decreed against it. Since 1841 when the doctrine of fellow service was first announced, the world, commerce and law, has moved forward. Moreover, the principle contended for by the respondent, to-wit, "a servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent," is supported by the common law and by the Jones Act. Its application to the case at bar will work no material prejudice to the uniformity of the maritime law. If anything at all, it will make for uniformity, for it has the sanction of both judicial and legislative authority, and is in keeping with the "principle of justice, expediency and public policy." (*Hough v. Texas,* supra.)

For the reasons stated, the decision of the Washington Supreme Court should be affirmed.

Respectfully submitted,

JOHN F. DORE,
MARK M. LITCHMAN,
Attorneys and Counsel for Respondent.

AMICUS CURIAE BRIEF

No.....

Supreme Court of the United States

OCTOBER TERM, 1926

INTERNATIONAL STEVEDORING COMPANY,
a corporation,

Petitioner,

vs.

R. HAVERTY,

Respondent.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

STATEMENT OF THE CASE

This is an action by a longshoreman to recover from his employer damages for personal injuries sustained while engaged in stowing cargo in the hold of a vessel. The accident was occasioned by the negligence of the hatch-tender in failing to give the customary and necessary warning signal about the movement of the cargo sling. Both the longshoreman and his employer, the master stevedore, are citizens of the State of Washington. Neither the vessel nor her owners are parties to the action. The vessel in question was moored to a dock in the Port of Seattle, Washington, and the

plaintiff was temporarily aboard to assist in loading a cargo of wool.

The Supreme Court of the State of Washington has in effect held that, in determining whether the hatch-tender and the respondent were fellow-servants, the state court cannot apply the common law of the state, but must be governed by the decisions of the admiralty courts. *R. Haverty vs. International Stev. Co.*, 134 Wash. 235, 235 Pac. 360.

The petitioner contends that the court's holding in this respect is correct, but urges that the court erred in further holding that, under the decisions of the admiralty courts, the hatch-tender is a vice-principal and not a fellow-servant of the respondent. The case is here for review on a Writ of Certiorari. The only question which we will discuss in this brief may be briefly stated as follows:

THE QUESTION

The tort being maritime, but purely local, and neither the vessel nor her owners being parties to the action, may a state court having jurisdiction of the parties apply its own fellow-servant rules, if to do so would neither work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law?

ARGUMENT

I.

COMMON LAW COURTS HAVE ALWAYS HAD JURISDICTION CONCURRENT WITH ADMIRALTY COURTS OF ALL ACTIONS IN PERSONAM TO RECOVER DAMAGES FOR MARITIME TORTS.

In order to discuss the question intelligently, it is first necessary to consider the meaning of Article 3, Section 2 of the United States Constitution, which extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and Section 9 of the Judiciary Act of 1789 which confers upon the United States District Courts,

> "exclusive, original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." (Judicial Code, Sections 24 and 256).

Before the adoption of the Constitution the common law courts exercised concurrent jurisdiction with admiralty courts in all causes of maritime cognizance where the plaintiff could proceed *in personam*.

> Storey's Commentaries on the Constitution, 5th Edition, Section 1666;
>
> *Taylor vs. Carryl*, 15 L. Ed. 1028;
>
> *Southern Pac. Co. vs. Jensen*, Opinion of Mr. Justice Pitney, 61 Ed. 1086, 1103.

The concurrent jurisdiction of the common law courts in such cases was neither taken away nor disturbed by the grant of admiralty jurisdiction to the United States. Mr. Justice Storey in his Commentaries on the Constitution, supra, Section 1166 says:

> "The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly, according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law."

This is quoted with approval by this court in *Taylor vs. Carryl*, 15 L. Ed. 1028, and by Mr. Benedict in his work on Admiralty (5th Addition, Section 20). Mr. Justice Nelson speaking for the Court in *New Jersey Steam Nav. Co. vs. Merchants Bank*, 12 L. Ed. 465, expressed the same views; so did Mr. Justice Holmes in *The Hamilton*, 207 U. S. 398; and Mr. Justice Pitney, in the Jensen

case, supra, after a scholarly and exhaustive investigation of the subject concludes as follows: (Pages 1106 and 1107).

> "The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as exceeding the jurisdiction of the courts of common law over civil causes that, before the constitution, were subject to the concurrent jurisdiction of the courts of admiralty and the common law courts. The first congress did not so construe it as the saving clause in the Judiciary Act conclusively shows. And, assuming that the states, in the absence of legislation by Congress, would be without power over the subject matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings in *rem*, to be mentioned hereinafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court." (Citing cases).

A.

THE CONCURRENT JURISDICTION OF THE COMMON LAW COURTS INCLUDES THE POWER TO APPLY COMMON LAW RULES OF DECISION.

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, Mr. Justice Holmes, speaking of the saving clause, said:

"The saving of a common law remedy adopted the common law of the several states within their several jurisdictions * * *"

Prior to the decision of this court in the case of *Chelentis vs. Luckenbach, S. S. Co.*, 247 U. S. 372, the power of the common law courts to apply the state rules of fellow service and contributory negligence *in all civil cases involving maritime torts*, was unquestioned.

Keating vs. Pacific Steamship Whaling Co., 21 Wash. 415, 48 Pac. 224; (Seamen. Vice Principal doctrine applied);

Nelson vs. Willey Steamship & Nav. Co., 26 Wash. 548; (Seamen. Vice principal doctrine applied);

Carlson vs. White Star S. S. Co., 39 Wash. 394; (Third officer of vessel directing loading, held vice principal of longshoremen);

Woods vs. Globe Nav. Co., 40 Wash. 376, 82 Pac. 401; (Seamen. Common law applied. Master of ship held vice principal);

Anderson vs. Globe Nav. Co., 57 Wash. 502; (Longshoreman. Hatch-tender held vice principal where he failed to give warning signal);

Westerlund vs. Rothschild, 53 Wash. 626; (Longshoreman. Hatch-tender gave wrong signal. Held vice principal);

Norman vs. Ship Owners Stev. Co., 59 Wash. 244; (Longshoreman. Failure to give warning signal. Hatch-tender held a vice principal);

Jacobson vs. Rotchschild, 62 Wash 127; (Longshoreman. Duty of master to give warning signal held non delegable. Local common law applied);

Larsen vs. Alaska Steamship Co., 96 Wash. 655; (Seamen. Boatswain directing work held vice principal);

Wilson vs. McKenzie, 7 Hill 95, 42 Am. Dec. 51;

Gabrielson vs. Waydell, 31 N. E. (N. Y.) 969;

Kalleck vs. Deering, 161 Mass. 469, 37 N. E. 450;

Anderson vs. Pittsburg Coal Co., 122 N. W. (Minn.) 794.

B.

THIS COURT SANCTIONED THE APPLICATION, BY THE STATE COURTS, OF COMMON LAW RULES OF DECISION IN CIVIL CASES OF MARITIME ORIGIN.

Moreover, this court had repeatedly sanctioned the application by the state courts of their own common law rules of decision in the exercise of their concurrent jurisdiction in civil cases of maritime origin.

Atlee vs. Northwestern Union Packet Co., 21 Wall. 389;

The Max Morris, 137 U. S. 1;

Belden vs. Chase, 150 U. S. 674;

The Steamboat New York vs. Rea, 18 How. 223;

The Atlas, 93 U. S. 302;

The Hamilton, 207 U. S. 398, 52 L. Ed. 264;

In *Atlee vs. Northwestern Union Packet Co.* 21 Wall. 389, 395-396, the Court said:

> "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the *rules of decision are different* * * *. An important difference, as regards this case, is the rule for estimating damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. But the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties * * * Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

In the *Max Morris*, 137 U. S. 1, a libel by a stevedore, to recover damages for personal injuries, this court applied the maritime rule of divided damages, saying,

> "We think this rule is applicable to all cases of maritime tort founded upon negligence and *prosecuted in admiralty*, as in harmony with the rule for the division of damages in cases of collision." (Italics ours).

Belden vs. Chase, 150 U. S. 674, 691, was a collision case in which the plaintiff elected to pursue his common law remedy in a state court. This court held that the rights and liabilities of the parties must be measured by the principles of the common law and not by the maritime rules. The court said at p. 691:

> "The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault, contributing to the collision, has long prevailed in England and in this country. The *Max Morris*, 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee vs. Northwestern Union Packet Co.*, 21 Wall 389.
>
> "In order to maintain this action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

The principle deduced from the foregoing cases may be thus stated: If the jurisdiction is concurrent in the common law and admiralty courts, each court is at liberty to apply its own rules of decisions; or, in other words, if the action is litigated in a common law court the rights and liabilities of the parties are measured by the principles of the common law—if

litigated in a court of admiralty their rights and liabilities are measured according to the standards of the maritime law. This is still the law of the land, unless it can be said that the cited cases have been impliedly overruled by the following decisions upon which the petitioner relies.

Southern Pacific Co. vs. Jensen, 244 U. S. 205;

Chelentis vs. Luckenbach Steamship Co., 247 U. S. 372;

Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149;

Washington vs. Dawson & Co., 264 U. S. 219;

Robins Dry Dock & Repair Co. vs. Dahl, 63 L. Ed. 372.

II.

THE JENSEN, KNICKERBOCKER ICE CO., DAWSON AND DAHL CASES HAVE NOT AFFECTED THE POWER OF THE STATE COURTS TO APPLY THE LOCAL COMMON LAW RULES OF MASTER AND SERVANT IN THE EXERCISE OF THEIR CONCURRENT JURISDICTION.

In *Southern Pacific vs. Jensen*, 244 U. S. 205, this court held invalid the Workmen's Compensation Act of New York as applied to a longshoreman injured while discharging cargo from a vessel afloat in navigable waters, because

> "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

Conceding that state legislation may to some extent change, modify or effect the general maritime law, the court said:

> "* * * no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, held invalid an Act of Congress amending the saving clause, which saves to suitors "in all cases the right of a common law remedy where the common law is competent to give it," by adding thereto the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The decision rests on two grounds:

(1) That the saving clause *preserves* but does not *create* remedies.

(2) That Congress cannot delegate to the various states the power to enact individual Workmen's Compensation Laws because "such an authorization

would inevitably destroy the harmony and uniformity which the constitution * * * establishes." In other words, the Act was condemned for the reasons pointed out in the Jensen case.

The prime reason why the Workmen's Compensation Laws involved in the *Jensen and Knickerbocker Ice Co.* cases were condemned is briefly stated in *Red Cross Line vs. Atlantic Fruit Co.*, 68 L. Ed. 582, 587, as follows:

> "The Workmen's Compensation Laws involved in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, 61 L. Ed. 1086 * * * (citing other cases), and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, 64 L. Ed. 834, were declared invalid, because *their provisions were held to modify or displace essential features of the substantive maritime law.*" (Italics ours).

Washington vs. Dawson & Co. 264 U. S. 219, is controlled by the principles laid down in the *Jensen* and *Knickerbocker Ice Co. cases.*

In *Robins Dry Dock & Repair Co. vs. Dahl*, the facts were these: The plaintiff, while employed by the Dry Dock Company and doing repair work on a vessel, then lying in navigable waters, was injured when a plank scaffold upon which he was standing broke and caused him to fall into the hold. His complaint alleged that the company failed to provide a safe scaffold as required by section 18 of the Labor

Laws of the State of New York which reads, as follows:

> "Any person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

The plain effect of the statute is to constitute the employer an *insurer* of such scaffolding. The trial judge instructed the jury that they might consider its provisions in determining whether or not the defendant was negligent. This court held the instruction erroneous and said:

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The statute was held invalid because, like the legislation involved in the Jensen case and others cited by Mr. Justice Brandeis' in *Red Cross Line vs. Atlantic Fruit Co.*, it modified or displaced essential features of the substantive maritime law, and, further, because it interfered with the proper harmony and uniformity of that law.

From the foregoing analysis of the *Jensen*, *Knickerbocker*, *Dawson* and *Dahl* cases, it is plain that there is nothing in those decisions which in the least militates against the power of the state court to apply the local common law rules of master and servant in actions to recover damages for maritime torts.

In each of those cases the court was dealing with remedies "wholly unknown to the common law," whereas, the instant case involves purely common law remedies. The application by the state court of the local fellow-servant rule to a longshoreman and his employer, would neither work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law; nor would it "modify or displace essential features of the substantive maritime law." *There is no substantive maritime law governing the rights of a longshoreman to recover damages for personal injuries sustained in the course of his employment.* The admiralty courts apply *common law principles* to sustain a libel, in personam, by a longshoreman against his master.

Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52;

Port of N. Y. Stevedoring Corp. vs. Castagna, 280 Fed. 618 (certiorari denied 66 L. Ed. 801);

Pacific American Fisheries vs. Hoof, 291 Fed. 306, (C. C. A. 9th), (certiorari denied 68 L. Ed. 521);

The Buffalo, 154 Fed. 815 (C. C. A. 2nd);

The Kinghorn, 297 Fed. 621, (C. C. A. 2nd);

Galley vs. Smith, 272 Fed. 999, Affirmed 280, Fed. 972, (C. C. A. 1st);

Alaska S. S. Co. vs. Egan, 202 Fed. 867 (C. C. A. 9th);

Carter et al vs. Brown, 212 Fed. 393, (C. C. A. 5th);

Carstensen vs. Hammond Lumber Co., 11 F (2d) 142, (C. C. A. 9th);

The Portland, 213 Fed. 699;

Vanier vs. Sweet, 243 Fed. 939;

Siebert vs. Patapsco Ship Ceiling & Steve. Co., 253 Fed. 685.

In the *Buffalo*, supra, the Circuit Court of Appeals for the 2nd Circuit, said at page 817:

> "The appellants contended that there can be no recovery in rem against the scow under the decision of the Supreme Court in *The Osceola*, 189 U. S. 158, 23 Sup. Court, 483, 47 L. Ed. 760. In answer to that contention it is sufficient to say that libellant was not a member of the crew of the scow. * * * Libellant was merely a stevedore or longshoreman in the employ of appellants, and the case is to be determined by ordinary rules governing the relation of master and servant."

And since there is no *Federal* common law, *Wheaton vs. Peters*, 8 L. Ed. 1055, 1078; *Western Union Telegraph Co. vs. Call Pub. Co.*, 45 L. Ed. 765, 770, the common law which the admiralty courts apply in such cases must necessarily be the common law of the state in which the action is brought. As said by Mr. Justice Homles in the Jensen case, at page 1101:

> "If admiralty adopts common law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. *It must take the rights of the parties from a different authority just as it does when it enforces a lien created by a state.* The only authority available is the common law or statutes of a state." (Italics ours).

Under the uniform decisions of the Supreme Court of the State of Washington, the hatchtender in the performance of his duty to give warning signals to longshoremen employed in the hold of a vessel, is not a fellow-servant but a vice principal.

> *Anderson vs. Globe Nav. Co.*, 57 Wash. 302;
>
> *Westerlund vs. Rothschild*, 53 Wash. 626;
>
> *Norman vs. Ship Owners Stev. Co.*, 59 Wash. 244;
>
> *Jacobsen vs. Rothschild*, 62 Wash. 127.

The common law thus applied by both the state and admrialty courts neither conflicts with nor displaces the maritime law, but, like the state statutes

which give a substantive right to recover for wrongful death on the high seas, it merely *supplements* it. *Red Cross Line vs. Atlantic Fruit Co.*, 68 L. Ed. 582, 587.

Western Fuel Co. vs. Garcia, 66 L. Ed. 210;

Great Lakes Dredge & Dock Co. vs. Kierejewski, 67 L. Ed. 756;

American S. B. Co. vs. Chase, 21 L. Ed. 369;

Sherlock vs. Alling, 23 L. Ed. 819.

The comparative negligence rule is clearly a characteristic feature of the maritime law, applied without exception to all controversies not only between employer and employee, but between the vessels, themselves, and their owners. Yet this court has without exception permitted the common law courts to apply their own contributory negligence doctrine in causes of maritime cognizance.

Belden vs. Chase, 150 U. S. 674;

The Max Marris, 137 U. S. 1;

The Atlee, 21 Wall. 389.

If the application by the state courts of their own contributory negligence doctrine does not "modify or displace essential features of the substantive maritime law," (nor interferes with its proper harmony and uniformity), we are at a loss to understand why the application of the local fellow-servant rule should

result in such modification, displacement, or diversity.

In answer to the contention that such application of the local fellow-servant rule would constitute an interference with maritime matters, we call attention to the fact that state laws relating to matters of local concern, incidentally effecting maritime affairs, (but not working material prejudice to the characteristic features of the general maritime law), have been repeatedly upheld by the court.

Knapp S. & Co. vs. McCaffrey, 177 U. S. 638;

Rounds vs. Cloverport Foundry & Mach. Co., 237 U. S. 303;

Southern Pac. Co. vs. Jensen, 244 U. S. 205, (Dissenting Opinions of Mr. Justice Holmes and Mr. Justice Pitney);

Grant Smith-Porter Ship Co. vs. Rhode, 257 U. S. 439;

Western Fuel Co. vs. Garcia, 257 U. S. 233;

Great Lakes Dredge & Dock Co. vs. Kierejewski, 261 U. S. 479;

Washington vs. Dawson & Co., 264 U. S. 219, (Dissenting Opinion of Mr. Justice Brandeis);

Red Cross Line vs. Atlantic Fruit Co., 264 U. S. 109;

Millers Indemnity Underwriters vs. Brand, 70 L. Ed.—Sup. Ct. Adv. Op. Vol. 8, p. 221.

In *The City of Norwalk*, 55 Fed. 98, 106, Judge Brown enumerates eleven other "instances * * * in which *new legal rights*, created by state authority in maritime affairs, have been recognized and enforced * * *"

> "First, liens for *supplies* to domestic vessels, (*The Lettawanna*, 21 Wall. 558;) second, liens for master's *wages* (*The Mary Gratwick*, 2 Sawy. 342, affirmed by Mr. Justice Field; the *Louis Olson*, 52 Fed. Rep. 652; the *J. E. Rumbell*, 13 Sup. Ct. Rep. 498;) *third, liens for* damages for *refusing to load* under a charter, (*J. F. Warner*, 22 Fed. Rep. 342, by Mr. Justice Brown;) fourth, liens for *double* wharfage (*The Virginia Rulon*, 13 Blatchf. 519;) fifth, action for half pilotage where a pilot's services were *refused*, (*Ex Parte McNeil*, 13 Wall. 236 and *Ex Parte Hagar*, 104 U. S. 520, re-affirming *Cooley vs. Port Wardens*, supra;) sixth, liens for expenses of seamen at a quarantined *hospital*, (*The Wensleydale*, 41 Fed. Rep. 829;) seventh, regulations as to *rivers*, *harbors*, and *wharves* (*County of Mobile vs. Kimball*, supra; *Escanaba & L. M. Transport Co. vs. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185; *Transportation Co. vs. Parkersburg*, 107 U. S. 691, 701, 704, 2 Sup. Ct. Rep. 732; *Packet Co. vs. Keokuk*, 95 U. S. 80; *Packet Co. vs. Aiken*, 121 U. S. 444, 7 Sup. Ct. Rep. 907; *Steamship Co. vs. Penn.* 122 U. S. 326, 346, 347, Sup. Ct. Rep. 1118;) eighth, *penalties* imposed for the protection of *fisheries*, (*Manchester vs. Mass*, supra; *Smith vs. State of Maryland*, 18 How. 71;) ninth, *quarantine laws*, (*Morgans L. & Tr. & S. S. Co. vs. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114) tenth, regulating the charges of floating elevators, (*Budd vs.*

doubtedly sound *as applied to seamen. Schuede vs. Zenith S. S. Co.*, 216 Fed. 566. But plainly the maritime doctrine of wages, maintenance and cure is not applicable to *longshoremen.* There is no "well recognized maritime rule concerning the measure of recovery" applicable to them. Indeed, until the decision of this court in *Atlantic Transport Co. vs. Imbrobek* (1914) it was doubted whether an admiralty court even had jurisdiction of a suit by a longshoreman against his employer to recover damages for personal injuries, where, (as in the case at bar), neither the vessel nor her owners were parties thereto.

> *Campbell vs. Hackfield & Co.*, 125 Fed. 696 (C. C. A. 9th).

The rights of longshoremen and the liabilities of their masters have always been measured by common law principles, even in admiralty.

> *The Buffalo*, 154 Fed. 815 (C. C. A. 2nd);
>
> *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 521, 50 L. Ed. 1208;
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> *The Kinghorn*, 297 Fed. 621;
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> *Seibert vs. Patapsco Ship Ceiling & Stev. Co.*, 253 Fed. 685;
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> *Jacobson vs. Rothschild*, 62 Wash. 127;
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> *Westerlund vs. Rothschild*, 53 Wash. 626;
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> *Lund vs. Griffiths-Sprague Stev. Co.* 108 Wash. 220;

Norman vs. Ship Owners Stev. Co., 59 Wash. 244.

The reason why the rights of seamen are determined by the maritime rules while those of longshoremen and other landsmen who are temporarily employed aboard a vessel, are measured by common law principles, is aptly stated by the Court of Appeals of New York in *Maleeny vs. Standard Ship Building Corp.* 237 N. Y. 250, 142 N. E. 602, 606:

> "The appellate division also in *Kennedy vs. Cunard S. S. Co.*, 197 App. Div. 459, 189 N. Y. S. 402, held that the rules relating to contributory negligence must be determined by the maritime law and not by the common law. This followed, so its opinion states, the determination in *Chelentis vs. Luckenbach S. Co. Inc.*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. The distinction, however, the appellate division failed to notice between seamen and the ordinary landservant temporarily working on a ship, such as a stevedore, painter or mechanic. *The law of the Chelentis case*, the *Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and *Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927, *was applied to the peculiar relationship existing between the members of the crew of a vessel and the owner.*.
>
> "The nature of a seamen's contract is such that unless the vessel be unseaworthy or there be a failure to supply and keep in order the proper appliances, appurtenant to a ship, a seamen for an injury received is only entitled to his maintenance and cure and to his wages, at least so long as the voyage is continued. For disobedience

to orders he may be locked up or put in irons. *These rules of maritime law, applicable to seamen and members of the crew, and so restricted by these decisions, have no application to shore-servants working on docked ships.* The instances where such servants like stevedores have recovered damages for injuries received through negligence while working on ships, are so numerous both in admiralty and in state courts that citations are unnecessary." (Italics ours).

There is nothing in the language of the Chelentis decision indicating that the law of that case is applicable to longshoremen. On the contrary it clearly appears that the law thereof is restricted to seamen.

IV.

THE FELLOW SERVANT DOCTRINE INVOKED BY PETITIONER IS AN OBSOLETE COMMON LAW RULE.

The fellow-servant rule which the petitioner conceives to be a *maritime* principle, applicable to this case, is but an obsolete *common law* rule of 1841. (18 R. C. L. 715-717, 730-731).

It was first applied by a court of admiralty in *Halvorsen vs. Nisen*, 3 Sawyer, 562, 11 Fed. Cas. 310, which cites as authority common law decisions. (See: *"The Extension to the Admiralty of the Fellow-Servant Doctrine"* by Frederick Cunningham, 18 Har. Law Rev. 294, 295).

When the common law courts modified the fellow-servant rule by engrafting upon it the vice principal

doctrine, the admiralty courts adopted the modification.

Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52;

Port of New York Stev. Corp. vs. Castagna, 280 Fed. 618; (C. C. A. 2nd); (Certiorari denied, 66 L. Ed. 801);

Pacific American Fisheries vs. Hoof, 291 Fed. 306, (C. C. A. 9th); (Certiorari denied, 68 L. Ed. 521);

The Kinghorn, 297 Fed. 621 (CCA 2nd);

Carter et al. vs. Brown, 212 Fed. 393 (C. C. A. 5th);

Alaska S. S. Co. vs. Egan ,202 Fed. 867 (C. C. A. 9th);

The Portland, 213 Fed. 699;

Vanier vs. Sweet, 243 Fed. 939;

Seibert vs. Patapsco Ship Ceiling & Stev. Co., 253 Fed. 685.

Congress has twice repudiated the fellow-servant doctrine as applied to seamen.

Section 20, Act. of March 4, 1915, 38 Stat. at L. Chap. 153, page 1185, and Section 33 of Act of June 5, 1920, Chap. 250, 41 Stat. at L. 1007. (Construed in *Panama R. R. vs. Johnson*, 264 U. S. 375).

For the foregoing reasons the fellow-servant rule invoked by the petitioner cannot be deemed a "characteristic feature of the general maritime law."

CONCLUSION

In conclusion it is respectfully submitted: (1) that the Supreme Court of the State of Washington erred in holding that the state court must be governed by the decisions of the admiralty courts in determining whether the hatch-tender was respondent's fellow-servant. (2) That no injury could have resulted to the petitioner's rights by reason of the error because under the well established common law rule of the State of Washington the hatch-tender was a vice principal.

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255.

The judgment should be affirmed.

Respectfully submitted,

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